89- 11 (1)

Supreme Court, U.S.
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CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NICHOLAS T. KITSOS,

Petitioner,

vs.

JOHN C. O'MALLEY, ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Does the Due Process of Law Clause of the 14th Amendment require that Petitioner be afforded and not denied or deprived of an opportunity to raise his Constitutional claims and defenses in these proceedings below?

2. Does the Due Process of Law Clause of the 14th Amendment prohibit Disciplinary Proceedings based on violation of Disciplinary Rules that are vague, indefinite, and uncertain?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Illinois, entered on January 18, 1989 and on April 3, 1989, on denial of Petition for Rehearing.

The Opinion of the Supreme Court of the State of Illinois, is unreported, non-final and stayed at this time. A copy of the Opinion is included in Appendix 1.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decision of the Illinois Supreme Court. A written opinion was issued by that court on January 18, 1989. Petitioner sought timely rehearing thereof. On April 3, 1989 the Supreme Court denied the Petition for Rehearing. A copy of the Order denying the Rehearing Petition is included in Appendix 2.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portion of the 14th Amendment to the Constitution of the United States, provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State Deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The proceeding below was a civil action in the nature of an original proceeding before the Illinois Supreme Court to determine whether I, a licensed attorney admitted to practice by the Supreme Court of Illinois on September 25, 1953, should be disciplined and which resulted in my suspension from the practice of law for one

year. On completion of the one year period of suspension, my return to practice is automatic and requires no reinstatement petition. No condition or restitution to automatic reinstate nor any conditions of suspension were imposed.

I have been practicing in the State and Federal Courts continuously for thirty-six years without prior blemish or charge against me.

This disciplinary proceeding was done through a Disciplinary Commission with Hearing and Review Boards and an Administrator acting both as an aid to these Boards and as a prosecutor, who all serve as agents for and appointed by the Illinois Supreme Court in administrating the disciplinary functions that have been delegated to them by the Illinois Supreme Court by Rules of Court. (App. 5, Sup. Ct. R. 751(a)).

I was charged by the Administrator of the Disciplinary Commission on a complaint filed with the Commission by the Administration on February 25, 1987. Prior to this, a complaint for a disgruntled client of mine by his new lawyer, had been filed with the Administrator in September, 1986. At that time, I had handled numerous litigation matters for him, continuously, for the prior 12 years. I was so engaged when I was discharged in September, 1984.

This discharge of me was not complete, since, as to the last legal matter and case I was handling for him at the time of discharge, the litigation had been settled through the use of a written Escrow Agreement with the Title Company which acted as Escrowee for the mutual benefit of the signatories to the Escrow Agreement and then solely on the direction of the signatories.

The sole signatories and parties to this Escrow Agreement were the Title Company as Escrowee, the lawyer for the defendant in this case settled and myself as lawyer for the plaintiff (the client).

By the terms of the written Escrow Agreement, the Escrowee was to hold $13,500, which I had deposited in the escrow for my client, and when the opposing lawyer deposited in the escrow a deed and other documents to convey and clear title to a parcel of real property then being possessed and used by my client, the Escrowee was then to pay the Escrow Fund of $13,500 to the other lawyer.

This was by the terms of the Escrow Agreement to occur in a matter of five or ten days at the most. No interest was to be earned on the fund nor was the other party ever to get interest.

The Escrow Agreement further provided that, in the event the other lawyer failed to make the required deposit in escrow of the deed and clearing papers, then he would be in default and on my sole direction to the Escrowee, the $13,500 on deposit would be returned to me and the Escrow terminated.

Until so notified by me, the Escrowee was to continue with and comply with the Escrow and receive the late deposits from the other lawyer.

This was set up in September 1976 and with the client present at the Escrow Office and approving the Escrow Agreement and the settlement, I deposited the money at the time.

Then the other lawyer failed to make his escrow deposits in five days and thereafter remained in default until the client closed the escrow on July 1, 1987 and obtained

from the Escrowee the $13,500 Escrow Fund. Up to the time I was discharged in September 1984, at the express direction of the client, I was to keep the Escrow going and alive and I did that and much more. After my discharge, the client and his new lawyer, without my knowledge and consent, kept this Escrow going in my name as signatory and party and without change or amendment of the Escrow Agreement (which would have required the approval and signature of the other lawyer which is doubtful that he would have done so) until the closing of this Escrow on July 1, 1987, approximately one month after my Disciplinary Hearing at which the client testified against me. The termination of the Escrow and the obtaining of the Escrow Fund by the client and his new lawyer was also without my knowledge and consent, just discovered and completely opposite to what the client testified he was doing and would do for several years in the future.

All this time, the client, for 15 past years has had possession and use of the land rent free and at no expense and without need of payment of real estate taxes. To this day, this situation continues.

In 1979, the client agreed with me that I should try and get the Escrow Agreement changed so that the Escrow Fund of $13,500 could earn interest without jeopardizing or terminating the escrow and that I was to take and keep taking the interest so earned as my fee and to pay the escrow fees and expenses and keep the escrow going and into the future until terminated so as to free the client of any responsibility for my fees due and thereafter due me for my work and also to use to pay the expenses and escrow fees.

I was able to do that and over the next five years I took from the interest approximately $4,000 as work fees

and paid them from the interest approximately $1,400 as expenses to the Escrowee. Up until this time I had only been paid $650 retainer fee plus court costs to file the Court case since my work started on this for the client in 1972. In doing so, the Escrow Fund always remained in the dominion and control of the Escrowee and was never disturbed and the Escrow itself was never disturbed and always remained alive and in force. The taking of the interest never jeopardized the continuation or consummation of the escrow.

The charging instrument alleged that I was guilty of misconduct in four separate respects from the single act of taking this interest as a fee, as follows (D.R. 1-102(a)(1), (2), (3) and (4), App. 7):

a) Commingling of clients funds;

b) Conversion of clients funds;

c) Engaging in illegal conduct;

d) Engaging in conduct involving moral turpitude, dishonesty, fraud, deceit, and misrepresentation.

By the Commission Rules required to be followed in disciplinary proceedings and hearings, there is no provision or allowance or method permitted for a Respondent to raise any constitutional challenges for any violations of his constitutional rights by the charges, the Administrator, or the Commission nor does the Commission have the power or authority to interpret or consider the Constitution and such constitutional challenges. (App. 5; App. 6).

No court or any other body has power or authority to conduct disciplinary proceedings and hearings except the Disciplinary Commission (App. 5, Sup. Ct. Rule 751(a)), and such proceedings must be according to the Commission Rules.

These disciplinary hearings are confined strictly to admission or denial of fact and fact resolution. (App. 6, Com. Rules 233).

On review of the Report, Findings and Recommendations rendered by the Hearing Board, legal arguments, authorities and case citations and of the record are prohibited. (App. 6, Com. Rules 301).

If discipline by the Supreme Court is required to be administered, then it must be done so by the Supreme Court.

I sought in these proceedings to raise and assert my constitutional claims but no one would listen or consider them.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER IS NOT AFFORDED AN OPPORTUNITY TO RAISE HIS CONSTITUTIONAL CLAIMS

My position on these proceedings is that I am denied Due Process of Law, protected and assured to me by the 14th Amendment, by these Commission Rules which allowed me to be found guilty of four separate and distinct offenses for one and the same act.

Under the prior determinations of the Illinois Supreme Court, even an innocent violation of the Disciplinary Rule on clients funds, under Disciplinary Rule 9-102(a) and (b),[1]

[1] *In re Lewis* (1987), No. 64910, p. 3; *In re Clayter* (1980), 78 Ill. 2d 276, 283 (Ill. Sup. Ct.); *In re Usijima* (1987), No. 65040, Ill. Sup. Ct.).

is a violation subjecting an attorney to being sanctioned or disciplined. Supreme Court Rule 771 specifies that this discipline can be from disbarment to reprimand. The amount of discipline imposed is supposed to be determined by the aggravating circumstances involved, if any.[2]

Dismissal of the charge is not a sanction or discipline to be imposed for misconduct violating the Disciplinary Rule, regardless of how innocent of intent that may be.[3]

But the rules make reasons for determining guilt, obscured by aggravating circumstances that may be suspected and worse, make aggravating circumstances to be implied from even a mere innocent disagreement such as under my case which is decided to be a violation of the Clients Funds Disciplinary Rule 1-102.

The proof of a *per se* violation became the same proof of three additional charges of misconduct without more and then whether in fact aggravating circumstances exist, it does not matter because three additional charges are added on to the *per se* violation and then these aggravating circumstances now exist simply because these three additional charges allege that and automatically are applied. This is not fair and a clear violation of Due Process of Law since this allows guilt to exist without proof of guilt and the standard of proof required is clear and convincing proof of such guilt. In Illinois, this is close if not the same as proof beyond a reasonable doubt.

By not allowing me a forum to raise this constitutional challenge, I have been denied my constitutional rights to Due Process of Law protected by the 14th Amendment.

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[2] See *supra*, note 1.

[3] See *supra*, note 1.

II.

THESE DISCIPLINARY RULES OF MISCONDUCT IN RULE 1-102 ARE VAGUE, INDEFINITE AND UNCERTAIN AND ARE PROHIBITED BY THE 14TH AMENDMENT

As applied to my conduct of taking interest money as a fee, the Rules 1-102 *et seq.* are vague, indefinite and uncertain and fail to give a person of ordinary intelligence fair notice of what he is charged with and of the need to defend against or that his conduct was forbidden and proscribed.

I served the client well. I did not know that in doing what the client wanted done, that I would face the risk of being branded a criminal because now the client became disgruntled.

This is not fair. Nothing in these Disciplinary Rules 1-102 *et seq.* (App. 6) tells anyone of reasonable intelligence that such a thing can happen. The 14th Amendment should protect against this happening.

CONCLUSION

Illinois is in a crisis because of Greylord. (App. 4). Over 100 judges, lawyers and court persons have been convicted of crimes. The back-lash in retaliation against lawyers, as in my case, must stop or there won't be any Judicial System left in Illinois. (App. 4). This Certiorari should be granted and is so requested.

Respectfully submitted,

NICHOLAS T. KITSOS, Pro Se
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Chicago, Illinois 60602

APPENDIX

APPENDIX 1

OPINION OF THE ILLINOIS SUPREME COURT

[FILED JANUARY 16, 1989]

Docket No. 67041—Agenda 21—September 1988.
In re NICHOLAS T. KITSOS, Attorney, Respondent.

JUSTICE MILLER delivered the opinion of the court:

On February 25, 1987, the Administrator of the Attorney Registration and Disciplinary Commission (the Administrator) filed a one-count complaint charging the respondent, Nicholas T. Kitsos, with commingling and conversion of client funds and with illegal conduct involving moral turpitude, dishonesty, fraud, deceit, and misrepresentation. The charges alleged that the respondent had taken as his fee, without authorization from his clients, interest earned in a client escrow account. A panel of the Hearing Board found that the respondent had engaged in the conduct as charged and recommended that the respondent be suspended from the practice of law for one year. Both the Administrator and the respondent filed exceptions to the Hearing Board's report and recommendation. A majority of the Review Board concurred in the findings of fact and conclusions of law of the Hearing Board but recommended that the respondent be suspended for a period of six months; one member of the Review Board disagreed with a number

of the findings of misconduct and recommended that the respondent be reprimanded. The respondent has filed exceptions to the recommendation of the Review Board. See 107 Ill. 2d R. 753(e)(5).

The sole controversy in this case is whether the respondent was authorized to retain the interest accrued upon an escrow account as his fee. The respondent contends that the allegations of misconduct were not proved by clear and convincing evidence. A brief recitation of the facts underlying this dispute is warranted in light of the respondent's challenge to the sufficiency of the evidence.

The respondent began representing the clients in question, William and Neta Lawson, in 1972, following the death of his brother, who was also an attorney. At that time the Lawsons were involved in a dispute concerning a real estate contract. In 1974 the respondent filed suit on behalf of the Lawsons, as purchasers, seeking specific performance of the contract. The suit remained pending for more than two years. In September 1976 the respondent entered into an agreement to settle the dispute. The settlement provided that the Lawsons would deposit $13,500 into an escrow account pending transfer of title.

On September 17, 1976, in accordance with the settlement agreement, the respondent established a deed and purchase money escrow account with the Chicago Title and Trust Company (Chicago Title) and deposited $13,500 in the account. More than two years later, on April 24, 1979, an escrow administrator at Chicago Title wrote to the respondent and to the sellers' attorney seeking information about the account. The letter writer noted that the account had been inactive since its inception in September 1976 and requested information on

the status of the escrow. In response to the escrow administrator's letter, the respondent wrote to Chicago Title on May 17, 1979, directing that the escrow funds be deposited in an interest-bearing account and that the interest earned on the funds be retained in the same account. The same day, the respondent wrote to the Lawsons to advise them of his action, enclosing with his letter a copy of the escrow administrator's inquiry.

On December 31, 1981, the respondent sent a letter to Chicago Title notifying the company of a change in his office address and requesting a statement "showing to date the funds and the amount that are on hand subject to my direction" in the Lawsons' escrow account. The respondent subsequently learned that the account contained $17,225.30. That sum apparently represented the initial deposit of $13,500 and $3,725.30 in accrued interest. On January 15, 1982, the respondent submitted to Chicago Title a document entitled "Amendatory or Supplemental Instructions to Be Attached to Escrow Trust Agreement" pertaining to the disposition of the interest in the account. The amendatory/supplemental instructions directed Chicago Title to deduct $1,055 from the funds and to pay that amount to itself as an investment fee, to retain $291.21, in addition to the principal sum, in the account, and to pay $2,379.09 to the respondent. A notation on the document represented that the Lawsons had approved the instructions. Soon after that the respondent received a check for $2,379.09, as he had requested, and he negotiated the check and retained the proceeds for his own benefit.

In February 1984 the respondent submitted to Chicago Title a second set of amendatory/supplemental instructions, which directed the company to pay to the respondent $1,774.15, less any unpaid investment fee. On

February 20, 1984, the respondent received a check for $1,654.15, and he negotiated the check and retained the proceeds for his own benefit. In May 1984 the respondent directed Chicago Title to pay him any amount in the escrow account in excess of $13,500. The respondent did not receive any additional funds, however, for by this time the Lawsons had advised Chicago Title that the respondent was no longer their attorney and had specifically directed the company not to transmit any money to the respondent. The respondent received a total of $4,033.24 in the two disbursements from the clients' escrow account.

Before the Hearing Board panel, Mr. Lawson testified that in 1976 he gave the respondent $13,500 to be placed in an interest-bearing escrow account. At the time the account was established, the Lawsons were living in Chicago. Soon after that, they moved to Arkansas, where they resided at the time of the hearing. Mr. Lawson explained that he had assumed that the escrow money was originally deposited in an interest-bearing account and that he did not learn otherwise until 1979, when the respondent informed him that the money had been transferred to an interest-bearing account. Mr. Lawson wrote to the respondent in March 1984 to inquire about the interest in the escrow account, but his letter was returned unopened. Mr. Lawson later telephoned the respondent, but the respondent did not provide any information about the interest. Mr. Lawson then retained a different attorney to investigate the matter, and he subsequently learned that the respondent had withdrawn money from the escrow account on two separate occasions. Mr. Lawson also stated that he never received copies of the respondent's amendatory/supplemental instructions and that he never spoke with the

respondent on the telephone about any fee arrangement. Mr. Lawson maintained that he never authorized the respondent to withdraw interest from the escrow account in payment of his fee. According to Mr. Lawson, the only bill he received from the respondent was one for about $875 in 1975, for a retainer and certain costs; the Lawsons paid the bill promptly. Mr. Lawson said that he would have paid any additional bill but that he never received a statement of an outstanding fee.

Mrs. Lawson also testified before the Hearing Board panel, corroborating her husband's testimony. She stated that she and her husband never received copies of any of the additional escrow instructions, never received any bills or statements of their account, and never authorized the respondent to withdraw funds from the escrow account.

The respondent testified that in 1975, when he filed suit on behalf of the Lawsons, he sent them a bill for about $875, which represented a retainer fee of $650 and an additional amount for certain advanced costs. The respondent admitted that the 1975 bill was the only bill he ever sent the Lawsons. The respondent further testified that sometime during 1979 he contacted the Lawsons by telephone. According to the respondent, during this discussion it was agreed that he would withdraw the interest accumulated in the escrow account and retain it as his fee. The respondent conceded that he never executed a document confirming the fee arrangement and never sent the Lawsons a written accounting.

The Hearing Board panel found that although the respondent may have been entitled to additional fees for his services, he was under a duty to advise his clients of the amount owing. The panel also found that the respondent was obligated to inform the Lawsons of any

amendments to the terms of the escrow agreement. The panel concluded that the respondent had engaged in illegal conduct involving moral turpitude, in violation of Disciplinary Rule 1—102(a)(3) (107 Ill. 2d R. 1—102(a)(3)); conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Disciplinary Rule 1—102(a)(4) (107 Ill. 2d R. 1—102(a)(4)); commingling, in violation of Disciplinary Rule 9—102 (107 Ill. 2d R. 9—102); and conversion. The Hearing Board panel recommended that the respondent be suspended from practice for one year.

A majority of the Review Board concurred in the findings of fact and conclusions of law of the Hearing Board but recommended that the respondent be suspended for a period of six months. One member of the Review Board recommended a sanction of reprimand, finding proof only of the respondent's failure to account to his clients for sums taken from the escrow account.

The respondent contends that the burden of proof was not properly placed on the Administrator and that the charges of misconduct were not proved by clear and convincing evidence. There is no dispute that in disciplinary proceedings the Administrator must prove the allegations of the complaint by clear and convincing evidence. (*In re Rosin* (1987), 118 Ill. 2d 365, 378; *In re Woldman* (1983), 98 Ill. 2d 248, 254; 107 Ill. 2d R. 753(c)(6).) Contrary to the respondent's argument, however, we conclude that the applicable standard was met in this case.

At the outset, we reject the respondent's argument that Disciplinary Rule 9—102, Preserving Identity of Funds and Property of a Client (107 Ill. 2d R. 9—102), has no application here because the interest earned on the escrow account did not belong to the clients in whose

behalf the account had been established but belonged instead to Chicago Title as the escrow agent, or to the respondent himself. The respondent cites no authority in support of this proposition. Moreover, the respondent's contention is belied by the explanation he gave in his May 1979 request that the escrow account be made interest bearing. At that time the respondent instructed Chicago Title, "Kindly place the funds deposited with you in an interest bearing account, so that my clients, Mr. & Mrs. Lawson[,] obtain interest on these funds, if that has not been done already." Indeed, since that time the respondent has regarded the accrued interest in the account as funds of his clients, for he repeatedly looked to the account in satisfaction of the fee he believed they owed him.

Before the Hearing Board panel, the Administrator presented the testimony of the clients in question, Mr. and Mrs. Lawson. Their testimony indicated that the respondent was vested with general authority to oversee the maintenance of the escrow account, but that he had no specific authority to deduct a fee for his services from interest earned on the account. There was no express fee arrangement, and, following the Lawson's payment of the respondent's bill in 1975 for the $650 retainer and certain advanced costs, the Lawsons did not receive any further bill or statement of account with respect to the respondent's services. The respondent did not send the Lawsons copies of his amendatory/supplemental instructions to the escrow account, which purported to authorize the respondent to withdraw sums of accrued interest. Both Mr. and Mrs. Lawson testified that they never authorized the respondent to retain any portion of the accrued interest as his fee.

The respondent, in his testimony before the Hearing Board panel, claimed that the Lawsons had, in fact, authorized him to retain the accrued interest in the escrow account as his fee. According to the respondent, this arrangement was settled during a telephone conversation with Mr. Lawson in 1979. The respondent also stated that he had represented the Lawsons in a variety of matters for almost 12 years and that during that period he had received for his services only a retainer of $650. The respondent conceded, however, that the only bill or statement of account he ever sent to the Lawsons was one in 1975, which, he acknowledged, was paid promptly.

The dispute in this case involved a credibility question regarding authority. The Hearing Board resolved the issue against the respondent. The panel found "the Lawsons' testimony to be forthright and direct concerning the understanding of the escrow account." The panel acknowledged that the respondent may have been entitled to additional fees for his services, apart from the retainer paid by the Lawsons in 1975, but the panel questioned the respondent's failure to send the clients any further billing statements for his services. Moreover, the panel concluded that the respondent had a duty to apprise the Lawsons of any changes he made in the escrow agreement.

The hearing panel observes the testimony of the witnesses and therefore is in a superior position to make determinations regarding credibility and to resolve conflicts in the testimony. (*In re Harris* (1982), 93 Ill. 2d 285, 295.) Accordingly, the factual findings of the hearing panel are accorded deference. (*In re Ushijima* (1987), 119 Ill. 2d 51, 56-57.) Our review of the record in this case satisfies us that the findings of fact made by

the hearing panel are supported by clear and convincing evidence.

The question remains what sanction should be imposed on the respondent for his conduct in the instant case. Attorney disciplinary proceedings are intended to safeguard the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach. (*In re Lenz* (1985), 108 Ill. 2d 445, 450-51; *In re Schelly* (1983), 94 Ill. 2d 234, 241.) Predictability and fairness require consistency in the imposition of disciplinary sanctions (*In re Saladino* (1978), 71 Ill. 2d 263, 275), though each case will be considered on its own facts (*In re Hall* (1983), 95 Ill. 2d 371, 375). Here, the Administrator asks that the respondent be disbarred. As we have stated, the Hearing Board recommended a one-year suspension, a majority of the Review Board recommended a six-month suspension, and one member of the Review Board, disagreeing with most of the findings of misconduct, recommended a reprimand. We are mindful that the sanctions recommended by the Hearing Board and the Review Board are simply that, recommendations. *In re Hopper* (1981), 85 Ill. 2d 318, 323.

We have consistently condemned attorney misconduct involving the commingling and conversion of client funds. (*In re Levin* (1987), 118 Ill. 2d 77, 88; *In re Young* (1986), 111 Ill. 2d 98, 103.) In view of the serious nature of that type of misconduct, we have previously held that, absent mitigating circumstances, commingling and conversion may be grounds for disbarment. *In re Cheronis* (1986), 114 Ill. 2d 527, 535; *In re Woldman* (1983), 98 Ill. 2d 248, 257.

On two separate occasions the respondent converted large sums of interest that had accrued in the escrow account. The respondent's actions were in callous disre-

gard of the interests of his clients. Throughout these proceedings the respondent has maintained that he was authorized to withdraw money from the account in payment of his fees. The testimony of the Lawsons flatly contradicted the existence of any such fee agreement, however, and there was no documentary evidence confirming such an arrangement. Even if it is assumed that the respondent was entitled to additional fees for his legal services, it cannot be said that he had the right or authority to "help himself," as it were, to the accrued interest in the escrow account. The respondent had a duty to render to the Lawsons an accounting of his services and a statement of the fees they owed him. The respondent could not simply deduct his compensation from whatever funds were within reach.

Before this court the respondent has also insisted that, apart from any fee agreement he might have had with the Lawsons, he was authorized by the escrow agreement itself to withdraw interest from the account. We do not agree with the respondent's interpretation of the escrow documents. The only evidence of a provision granting the respondent such authority is contained in the respondent's first set of amendatory/supplemental instructions to the escrow agreement. There, the respondent advised Chicago Title that interest in the account was to be held or distributed "subject to my order and direction." The Lawsons, however, were unaware of the new instructions, and did not consent to the withdrawals of interest in payment of attorney fees.

In mitigation, we note that the respondent, who was admitted to practice in this State in 1953, has no prior disciplinary record. Moreover, although the respondent has continued to maintain that his actions were proper,

he cooperated fully with the Hearing Board and the Review Board in these proceedings. In consideration of these circumstances, we conclude that the respondent should be suspended from the practice of law for a period of one year.

For the reasons stated, the respondent is suspended from the practice of law for a period of one year.

Respondent suspended.

JUSTICE CALVO took no part in the consideration or decision of this case.

APPENDIX 2

ORDER DENYING REHEARING

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 3, 1989

Mr. Nicholas Kitsos
105 W. Madison St.
#408
Chicago, IL 60602-4603

No. 67041—In re: Nicholas T. Kitsos. Disciplinary Commission.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Calvo, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 13, 1989.

APPENDIX 3

REPORTS OF HEARING BOARD AND OF REVIEW BOARD

[FILED APRIL 13, 1988]

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:	)	
	)	
NICHOLAS T. KITSOS,	)	
	)	Administrator's No. 87 CH 43
Attorney-Respondent,	)	
	)	
No. 1476327.	)	

REPORT AND RECOMMENDATION OF THE REVIEW BOARD

After full consideration and review of all matters of record, the Review Board concurs with the findings of fact and conclusions of law of the Hearing Board but disagree with the measure of discipline. The Review Board recommends that the Respondent be suspended for a period of six months.

Panel member Marshall A. Susler would reprimand Respondent for failure to account for monies taken from his escrow account but is of the opinion that there was no

clear and convincing proof as to the remaining charges alleged in the complaint.

The Report and Recommendation of the Hearing Board is attached.

Respectfully submitted,
Martin L. Silverman,
Acting Chairman
Herbert J. Bell
Michel A. Coccia
C. William Fechtig
John C. Menk

Members, Review Board

Member Watts C. Johnson did not participate.

This matter decided April 8, 1988.

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:	)	
	)	
NICHOLAS T. KITSOS,	)	
	)	Administrator's No. 87 CH 43
Attorney-Respondent,	)	
	)	
No. 1476327.	)	

REPORT & RECOMMENDATION OF HEARING BOARD

The Administrator brought a complaint against NICHOLAS T. KITSOS which was heard on May 19, 1987, by Panel 3 of the Hearing Board of the Attorney Registration and Disciplinary Commission consisting of SANDRA KERRICK, SHELDON J. SANDMAN and WILLIAM M. DICKSON. The Administrator was represented by THOMAS R. SUKOWICZ and the Respondent was represented by GEORGE B. COLLINS.

FINDINGS OF FACT

The Respondent was charged in A one Count Complaint with representing WILLIAM and NETA LARSON in a real estate transaction wherein the Respondent obtained funds from an escrow account set up for the benefit of the Larsons without authority from the said Larsons thereby converting the funds to Respondent's own use.

The Respondent, in taking over the handling of the Larson case from his deceased brother, resolved the dispute

over a Real Estate Contract by entering into an agreement with opposing counsel to settle the dispute by providing that the Larsons, through the Respondent, would deposit $13,500.00 into an escrow account at the Chicago Title and Trust Company pending transfer of Title. The Respondent received the $13,500.00 from the Larsons and deposited the same to an escrow account at the Chicago Title and Trust Company in September of 1976.

In April of 1979, the funds still being held in the escrow account, the Respondent, in responding to a status letter from the Chicago Title and Trust Company, directed that the funds be placed in an interest bearing account. The Chicago Title and Trust Company then complied with the request of the Respondent. In January of 1982, after being advised by Chicago Title and Trust that the escrow account now had $17,225.30, the Respondent prepared a document entitled "Supplemental Instructions to be attached to Escrow Trust Agreement" directing Chicago Title and Trust to pay Respondent $2,379.09 from the escrow account. Respondent received the above sum and negotiated the draft from the Chicago Title and Trust Company. Again, in February of 1984, Respondent prepared another document entitled "Supplemental Instructions to be attached to Escrow Trust Agreement" which directed Chicago Title and Trust Company to pay the Respondent $1,774.15 less any unpaid investment fee from the escrow account. On February 20, 1984, Respondent received from the escrow account the sum of $1,654.15 which he negotiated and used for his own benefit.

The Administrator's position was that at no time did the Larsons authorize Respondent to take any funds from the escrow account to use for his own benefit.

CONCLUSIONS OF FACT & LAW

The Larsons, who had moved some years before to Arkansas, were produced at the hearing by the Administrator. Mr. Larson testified that he gave $13,500.00 to Respondent to go into an interest bearing escrow account

at Chicago Title and Trust Company in 1976 and found out three years later, via a letter from the Respondent, that the money had been placed in an interest bearing account in 1979. Mr. Larson testified that he heard nothing from the Respondent from 1979 and in 1984, Mr. Larson sent a letter to the Respondent inquiring about the money in the escrow account. This letter was returned to Mr. Larson unclaimed as the Respondent apparently had moved and had not notified the Larsons of his new address. Mr. Larson stated he contacted another attorney in May of 1984 to look into the matter of the escrow account and was thereafter advised that withdrawals had been made in 1982 and 1984. Mr. Larson stated he never authorized the Respondent to withdraw any funds from the escrow account nor did he ever receive any letters concerning withdrawals from the Respondent nor was he ever told or did he ever receive copies of the Amended or Supplemental Escrow Instructions from the Respondent or anyone else concerning the removal of funds from this account. Mr. Larson further testified that he had only received one bill from the Respondent in 1975 for $874.00 and that bill was promptly paid some weeks later.

Mrs. Larson also testified that neither she nor her husband ever authorized the Respondent to take any money whatsover out of the escrow account. She further testified that neither she nor her husband ever received any Supplemental or Amendatory Escrow Instructions from the Respondent.

Respondent was then called to testify on his own behalf and stated that he was paid a retainer fee and costs in 1975 by the Larsons. He further stated that he had talked on the telephone with Mr. Larson about getting paid from the interest in the escrow account for his fee and it was "agreed with Mr. Larson, that the Respondent would keep the escrow going and that the interest would go to the Respondent for his fees." The Respondent testified that he had a large responsibility to watch over the property for which the escrow had been set up and "keep an eye on it after the Larsons moved out of town."

On cross-examination, the Respondent testified he had conversations with the Larsons about the fees but could not remember if they were in person or by telephone. He admitted he never sent copies of the Amendments to the escrow instructions to the Larsons, nor did he ever send anything in writing to them concerning any of the withdrawals. He also testified he never sent the Larsons any statements for services rendered, other than the bill which was paid in 1975.

The panel found the Larsons testimony to be forthright and direct concerning their understanding of the escrow account. While it may be argued that the Respondent may have been entitled to additional fees for the years in which he had handled the escrow account since 1975, the Panel finds it difficult to understand why he never rendered a bill for services rendered for the years subsequent to 1975 and finds the argument weak that he would be entitled to all interest earned on the escrow account as and for his professional services rendered. Furthermore, if the Respondent's agreement with the Larsons was to be paid the interest from the escrow account set up at the Chicago Title and Trust Company, why then, did the Respondent wait until 1979 to transfer the money into an interest bearing account, and only did so upon being contacted by the Chicago Title and Trust Company making inquiry as to the status of the account itself. Again, when the Respondent changed the terms of the Escrow Agreement providing for payment of funds to him in 1982 and 1984, he most certainly owed a duty to his clients to make them aware of any changes in the Escrow Agreement and most certainly he owed them this duty when the changes were of a substantive nature. The Respondent, again, by his own testimony never advised the Larsons of the actual amount of his fees before, at the time, or after receiving the monies from the escrow account in 1982 and 1984.

Based upon the testimony of the witnesses at the hearing and the evidence introduced therein, the hearing Panel finds that the Respondent has engaged in:

a) illegal conduct involving moral turpitude in violation of Rule 1-102(a)(3) of the Illinois Code of Professional Responsibility (1980);

b) Conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1-102(a)(4) of the Illinois Code of Professional Responsibility (1980);

c) commingling in violation of Rule 9-102 of the Illinois Code of Professional Responsibility (1980); and

d) conversion.

RECOMMENDATION

The hearing Panel recommends that the license to practice law of NICHOLAS T. KITSOS be suspended for a period of one (1) year.

/s/ Sandra S. Kerrick
SANDRA S. KERRICK

/s/ Sheldon J. Sandman
SHELDON J. SANDMAN

Dated: October 28, 1987

/s/ William M. Dickson
WILLIAM M. DICKSON

APPENDIX 4

BLUE RIBBON COMMITTEE TO STUDY THE FUNCTIONS AND OPERATION OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

April, 1989

EXCERPT FROM FINAL REPORT

16-18. *Conduct of Process*

Once misconduct is alleged, the individual attorney so charged is apprehensive. The Court, the Commission and the staff should not underestimate the stress created by such a situation. Indeed several attorneys pointed out that the mere receipt of the ARDC annual reports mailed in envelopes not indicating their content is stressful in a law office. ARDC envelopes should clearly show when they contain an annual report.

* * * * *

As the Greylord investigations demonstrated, there is a need for sufficient staff to perform aggressive investigation and policing in areas where lawyer misconduct is known to occur. As impact of the Greylord investigations passes, the staffing has been increased from 43 in 1984 to 79 in 1988. The BRC concludes that the staffing issue is being addressed.

* * * * *

Not only is there a need for the bar to be educated on disciplinary procedure, there is a continuing need for education of a lawyer's professional responsibility. This responsibility is more and more defined by disciplinary case law rather than ethics opinions.

In addition, the BRC believes the ARDC has a serious problem created by the repeated challenges to the integrity of its processes. The 1988 ISBA Report notes that the ARDC is viewed as a "shadowy reviewing authority."

Hopefully that will change somewhat when the proceedings are opened to the public. We believe that ventilation will add credibility to the process. It will also change if the bar and public are better educated. The ARDC should consider adding a public information staff person and using the official publications of the bar and the legal press to assist it. Important developments and cases should be publicized.

* * * * *

23. *Appointment Process*

As a formal matter, members of the Commission and the Review Board are appointed by the Supreme Court; members of the Inquiry and Hearing Boards are appointed by the Commission. The 1988 ISBA Report states, "The specific details on how Board members are selected is not easily understood or available. . . . There is also some serious concern about who makes the final selection and approval of the Boards members." These concerns are not . . . Several representatives of the bar stated that the ARDC staff had "too heavy a hand" in the selection of board members and such participation could "compromise the system."

The 1988 ISBA Report and several lawyers who spoke with the BRC stated there is an "elitist representation of lawyers serving on the various panels." The BRC recommends that the Commission become considerably more active than it has been in the past in the recruitment, screening and appointment of board members.

The relationships between the Commission and the organized bar, and the Court and the organized bar, appear strained—at least from the bar's perspective. The organized bar has offered to assist the Court and Commission in the selection and screening process. The offer should be accepted. We recognize there is a certain irony here. The ARDC was created to distance the disciplinary process from the organized bar. But notwithstanding some points of view to the contrary, we conclude the pendulum may have swung too far the other way. By distancing

themselves from the organized bar, the Court and the Commission are failing to avail themselves of valuable assistance and support.

To create a more representative group, the Court and the Commission should actively recruit representation of minority groups as well as representatives of the criminal defense bar, the family law bar, the personal injury and defense bar, and sole and small firm practitioners. As noted above, the Commission should be especially sensitive to the selection of non-lawyer members of the Inquiry Board, should such individuals be added to that Board.

Recommendation 23—Appointment Process

The Supreme Court and the Commission should become more active in recruitment, screening and appointment of board members and should create a more diverse ARDC.

* * * * *

The BRC has concluded that it is inappropriate, in absence of some factual basis, for the Administrator to inititate investigations or "sting" activities looking for criminal conduct by lawyers which could merely lead to professional sanctions. Such investigations are the proper province of federal and state criminal law enforcement authorities.

As we noted above, the Administrator does not need a formal complaint to proceed against an attorney. He may, and he does, proceed without formal complaint in some instances. The BRC anticipates this type of action will continue.

* * * * *

Timely and even-handed response to legitimate concerns and fair criticism is the best path to avoid a constitutional confrontation. As we have noted above, some of the concerns about the existing structure and operation of the ARDC are well founded. Our recommendations are designed to meet that criticism through opening the process to public review and expanding public participation.

* * * * *

APPENDIX 5

EXCERPT OF RULES OF THE ILLINOIS SUPREME COURT–CHAP. 110A, ILL. REV. STAT.–SECTIONS 751-774

PART B. REGISTRATION AND DISCIPLINE OF ATTORNEYS

751. (Supreme Court Rule 751). Attorney Registration and Disciplinary Commission

(a) Authority of the Commission. The registration of, and disciplinary proceedings affecting, members of the Illinois bar shall be under the administrative supervision of an Attorney Registration and Disciplinary Commission.

(b) Membership and Terms. The Commission shall consist of four members of the Illinois bar and three nonlawyers appointed by the Supreme Court. One member shall be designated by the court as chairperson. Unless the court specifies a shorter term, all members shall be appointed for three-year terms and shall serve until their successors are appointed. Any member of the Commission may be removed by the court at any time, without cause.

753. (Supreme Court Rule 753). Inquiry, Hearing and Review Boards

(a) Inquiry Boards.

* * * * *

(c) Hearing Board.

* * * * *

(5) Proceedings before the Board shall be conducted according to the practice in civil cases as modified by rules promulgated by the Commission pursuant to Rule 751(a).

(6) Except as otherwise expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

* * * * *

754. (Supreme Court Rule 754). Compulsory Process

The Administrator, the Inquiry Board and the Hearing Board are empowered to take and transcribe the evidence of respondents, petitioners and any other attorney or person who may have knowledge of the pertinent facts concerning any matter which is the subject of an investigation or hearing. Upon request of the Administrator, the respondent, the petitioner or the inquiry or hearing boards, the clerk of the court shall issue subpoenas *ad testificandum* or subpoenas *duces tecum*. The Administrator, the respondent or the inquiry or hearing boards may report to the court the failure or refusal of a respondent, petitioner, attorney or any other person to attend and testify in response to any subpoena or to produce the items specified in a subpoena *duces tecum*.

Amended June 12, 1987, eff. Aug. 1, 1987.

* * * * *

771. (Supreme Court Rule 771). Types of Discipline

Conduct of attorneys which violates the Code of Professional Responsibility contained in article VIII of these rules or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court. Discipline of attorneys may be:

(a) disbarment;

(b) disbarment on consent;

(c) suspension for a specified period and until further order of court;

(d) suspension for a specified period of time;

(e) suspension until further order of the court;

(f) suspension for a specified period of time or until further order of the court with probation; or

(g) censure.

Amended Aug. 9, 1983, eff. Oct. 1, 1983.

* * * * *

APPENDIX 6

EXCERPT OF RULES OF ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION CHAP. 110A, ILL. REV. STAT. 1988 FOLLOWING SUP. CT. RULE 774

RULES OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

For Disciplinary Proceedings Under Illinois Supreme Court Rules 751 to 774

ARTICLE I. GENERAL

Rule 1. Preamble

It is the policy of the Commission that disciplinary matters be handled expeditiously, with due regard to the right of the respondent to have adequate time to prepare his defense. The courts, the public, the bar, and the respondent have a vital interest in an early determination of any charge which bears upon the fitness of an attorney to practice his profession. The elimination of unnecessary delay was a major objective of the Court in creating the Commission and in establishing the office of the Administrator. Implementation of this objective is one of the principal purposes of the following rules.

Adopted eff. April 19, 1985.

* * * * *

Rule 53. Duty of Attorneys

The Administrator may request the respondent, or any other attorney who may have knowledge of pertinent facts, to provide information, in writing, concerning the matter under investigation. Such requests by the Administrator may be made by letter. It shall be the duty of

every attorney admitted to practice in this state to respond within 14 days to any such request from the Administrator.

Adopted eff. April 19, 1985.

* * * * *

Rule 233. Answer to be Specific

The answer shall specifically admit or deny each allegation of the complaint. Every allegation not specifically denied is deemed admitted unless the answer states the reason the respondent is unable to make a specific denial.

Adopted eff. April 19, 1985.

Rule 234. Replies

No reply shall be filed by the Administrator. Any new matter alleged in the respondent's answer shall be deemed denied.

Adopted eff. April 19, 1985.

Rule 235. Motions in Regard to Pleadings

All motions in regard to pleadings shall be made in writing prior to hearing. Rulings on motions shall be made by the chair of the panel or in a manner as the chair shall determine. Technical objections to pleadings shall not be favored and a pleading shall not be held defective unless the alleged defect results in actual prejudice to the objecting party. No oral arguments shall be allowed on motions. The movant may submit written suggestions with citations of authority in support of the motion and the other party may submit counter suggestions within 7 days after receipt of the movant's suggestions. All defects in pleadings, either in form or substance, shall be deemed waived if not objected to before hearing.

Adopted eff. April 19, 1985.

* * * * *

Rule 284. Post-Trial Proceedings

(a) Post-Trial Motions. Except as provided herein, post-trial motions shall not be filed with or considered by the Hearing Board. A matter which might otherwise be presented by post-trial motion may be the subject of an exception filed with the Review Board. Motions for an extension of the time within which to file exceptions to the report of the Hearing Board shall be ruled upon by the chair of the hearing panel which prepared the report.

* * * * *

ARTICLE V. THE REVIEW BOARD

Rule 301. Docketing of Matters; Notice of Review

Every report of the Hearing Board is reviewable by the Review Board as of right. Review is initiated by filing exceptions. Exceptions shall specify the report or portion of the report of which review is sought and the relief sought from the Review Board. Exceptions shall not contain legal argument or citation to the record or legal authority. No formal exception need be taken in order to make any ruling or action of the Hearing Board reviewable. Upon receipt of exceptions, the Clerk shall docket the matter, send a copy of the report and exceptions to each member of the Review Board, and notify the parties. Either party may file a request for briefs or for oral argument with the exceptions or within 14 days after receipt of the notice of review. Either party may assert that the Hearing Board erred regardless whether the party filed exceptions.

Amended Jan. 15, 1988.

* * * * *

APPENDIX 7

CODE OF PROFESSIONAL RESPONSIBILITY– CHAP. 110A–PREFACE & CANON, ILL. REV. STAT. 1988

ARTICLE VIII. CODE OF PROFESSIONAL RESPONSIBILITY

Adopted June 3, 1980

Effective July 1, 1980

Committee Commentary

Preface

The Committee on Professional Responsibility was created by Order No. MR 2167 of the Illinois Supreme Court, dated May 12, 1978. The committee prepared a draft Code of Professional Responsibility, and transmitted its proposal to the court, along with an explanatory commentary, in December 1978. The court considered the comments of various individuals and bar associations on the committee's proposed draft, and submitted certain questions to the committee for further consideration. On June 3, 1980, the court officially adopted the Illinois Code of Professional Conduct.

The present American Bar Association Code of Professional Responsibility (1977) was the model from which the committee worked.[1]

An initial determination was made to focus only on the disciplinary rules and to give no consideration to the ethical considerations contained in the ABA Code. The ethical considerations are characterized by the preliminary statement to the ABA Code as "aspirational," in contrast to the disciplinary rules, which "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Moreover, their scope is

considerably broader than that of the disciplinary rules. The committee viewed the ethical considerations as a body of information useful in providing additional guidance to lawyers, but not necessary to a judicially sanctioned body of rules intended to provide a basis for discipline. Hence, they were neither reviewed by the committee, nor officially adopted by the court.

One of the central purposes of the commentary which the committee initially submitted to the court was to explain departures from the ABA Code or, in many cases, the reasons why the ABA model was followed. A related purpose was to provide additional guidance or explanation of the meaning and application of various Code provisions.

At the request of the court, the intitial commentary has been revised and is offered as a supplement to the Code itself. In contrast to the Code, which the court formally adopted, the commentary is advisory only and represents the thinking of the Committee on Professional Responsibility. However, it is hoped that the commentary will be of some use to Illinois lawyers in conforming their conduct to the dictates of the Code.

[1] An ABA commission has been at work since 1977 on a new ABA code.

* * * * *

DISCIPLINARY RULES

Rule 1-101. Maintaining Integrity and Competence of the Legal Profession

(a) A lawyer is subject to discipline for the violation of the disciplinary rules of the Code of Professional Responsibility as hereinafter set forth.

(b) A lawyer is subject to discipline if he has made a material false statement in, or if he has deliberately failed to disclose a materially fact requested in connection with, his application for admission to the bar.[1]

DISCIPLINARY RULES

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(a) A lawyer is subject to discipline for the violation of the disciplinary rules of the Code of Professional Responsibility as hereinafter set forth.

(b) A lawyer is subject to discipline if he has made a material false statement in, or if he has deliberately failed to disclose a materially fact requested in connection with, his application for admission to the bar.[1]

(c) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or any other relevant attribute.

[1] Throughout the Code, pronouns of the masculine gender will be used, for the sake of brevity, as encompassing both male and female lawyers.

Rule 1-102. Misconduct

(a) A lawyer shall not

(1) violate a disciplinary rule;

(2) circumvent a disciplinary rule through actions of another;

(3) engage in illegal conduct involving moral turpitude;

(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or

(5) engage in conduct that is prejudicial to the administration of justice.

* * * * *

Rule 9-102. Preserving Identity of Funds and Property of a Client

(a) All funds of clients paid to a lawyer or law firm, including funds belonging in part to a client and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more separate identifiable trust accounts in a bank or savings and loan association maintained in the State in which the law office is situated.

(b) The portion of funds deposited in accounts described in Rule 9-102(a) belonging to the lawyer or law firm may be withdrawn when due, after reasonable notice to the client of an intention to withdraw, unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

* * * * *

Supreme Court, U.S.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NICHOLAS T. KITSOS,

Petitioner,

vs.

JOHN C. O'MALLEY, ADMINISTRATOR,
ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has failed to establish federal jurisdiction pursuant to 28 U.S.C.§1257(3).

II. Whether Disciplinary Rule 1-102 of the Illinois Code of Professional Responsibility is vague, indefinite and uncertain to the extent that disciplinary proceedings based thereon violate the Due Process requirement of the Fourteenth Amendment.

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TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

For the sake of brevity, Respondent will not include sections in this brief for opinion below and jurisdiction as they are discussed in the sections for statement of the case and argument, respectively.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

U.S. CONST.
amend. XIV, §1. . . . .see Appendix A

United States Code,
28 U.S.C.§1257(3) . . .see Appendix B

Ill. Rev. Stat. ch. 110A, Art. VIII,
Rules 1-102, (1980)
9-102 (1987). . . . . .see Appendix C

Ill. Rev. Stat. ch. 110A, para. 753(b)
(c) and (e) (1985). . .see Appendix D

STATEMENT OF THE CASE

On February 25, 1987 the Administrator of the Attorney Registration and Disciplinary Commission filed a complaint against Petitioner pursuant to Rule 753(b) of the Supreme Court of Illinois. (See Appendix D). The complaint charged Petitioner with converting and commingling client funds amounting to $4,033.24, engaging in illegal conduct involving moral turpitude and engaging in conduct involving dishonesty, fraud, deceit and misrepresentation.

On May 19, 1987 a hearing on the Administrator's complaint was conducted before the Hearing Board pursuant to Rule 753(c) of the Supreme Court of Illinois. (See Appendix D). Petitioner was represented by counsel at the hearing and participated in the proceedings before the Hearing Board.

On November 16, 1987 the Hearing Board issued a report and recommendation finding that Petitioner was guilty of the conduct alleged in the Administrator's complaint and recommending that petitioner be suspended from the practice of law for one year.

On December 4, 1987 Petitioner appealed the finding and recommendation of the Hearing Board by filing exceptions in the Review Board pursuant to Rule 753(e) of the Supreme Court of Illinois. (See Appendix D).

On April 13, 1988 the Review Board issued its Report and Recommendation. The Review Board concurred with the findings of fact and conclusions of law of the Hearing Board, but recommended that Petitioner be suspended from the practice of law for a period of six months.

On May 3, 1988 Petitioner appealed the findings and recommendation of the Review Board by filing exceptions in the Supreme Court of Illinois pursuant to Rule 753(e) of the Supreme Court of Illinois. (See Appendix D).

On January 18, 1989, after considering briefs and oral arguments, the Supreme Court of Illinois issued its opinion that Petitioner be suspended from the practice of law for one year.

On February 6, 1989, Petitioner filed a Petition for Rehearing with the Supreme Court of Illinois. On April 3, 1989, the Supreme Court of Illinois denied the petition.

On April 6, 1989, Petitioner filed a Motion to Stay Mandate with the Supreme Court of Illinois so as to permit him to seek review in the Supreme Court of the United States. On April 11, 1989 the Supreme Court of Illinois issued an order

allowing Petitioner's motion.

On June 30, 1989, Petitioner served Respondent with copies of his Petition for Writ of Certiorari to the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to Supreme Court of Illinois should be denied for the following reasons:

First, it is well established that the United States Supreme Court is vested with jurisdiction only where a federal question was properly presented in the state court proceedings. Missouri ex rel. Missouri Insurance Company v. Gehner, 281 U.S. 313, 320 (1930). In the instant case, Petitioner failed to raise any constitutional claim in any of the proceedings before the Hearing Board, Review Board or Supreme Court of

Illinois. Petitioner did not provide the Supreme Court of Illinois an opportunity to consider or decide any federal question. As a result, Petitioner failed to preserve any federal question for review by this Court.

Second, Petitioner was not denied due process of law by reason of vagueness of Rule 1-102. Petitioner was essentially charged with conversion of a client's funds in the amount of $4,033.24. His theft violated Rule 1-102 of the Code which prohibits illegal activity involving moral turpitude and dishonest conduct. Petitioner received notice of the charges, was given an opportunity to defend, and did defend himself against those charges in complete compliance with the due process requirements mandated in In re Ruffalo, 390 U.S. 544 (1968).

ARGUMENT

I. PETITIONER HAS FAILED TO ESTABLISH FEDERAL JURISDICTION PURSUANT TO 28 U.S.C.§1257(3).

Petitioner has failed to demonstrate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois.

Petitioner alleges that his right to due process under the Fourteenth Amendment of the United States Constitution (See Appendix A) was violated. This Court has stated that it will not consider claims which were not properly presented in the highest court of the state. Missouri ex rel. Missouri Insurance Company v. Gehner, 281 U.S. 313, 320 (1930).

Generally, a constitutional question is raised too late even if first raised in a petition for rehearing in the highest level state court. Great Northern Railway Co. v. Sunburst Oil &

Refining Company, 287 U.S. 358, 366 (1932). In this case, Petitioner did not even raise a federal question in his petition for rehearing filed with the Supreme Court of Illinois. Petitioner first raised any federal constitutional claim in the petition for Writ of Certiorari he filed in this Court. As a result, he failed to properly establish the jurisdiction of this Court to review the decision of the Supreme Court of Illinois.

To invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, Petitioner must establish that his case fits within an exception to the general rule. Id. at 367. Petitioner has not set forth any authority asserting that he fits within an exception. The two exceptions discussed in Great Northern Railway are, first, where the

constitutional question is considered and decided by the state court, and second, where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right.

The first of these exceptions does not apply to Petitioner because his constitutional claims were never raised at the state court.

The second exception does not apply because the opinion of the Supreme court of Illinois did not contain anything new or unexpected. The Court drew the same conclusions of fact and law as the Hearing Board and the Review Board. The Court's opinion that suspension of one year was warranted is identical to the recommendation of the Hearing Board and much less than the disbarment originally sought by the Administrator.

The only other possible exception under which Petitioner may invoke federal jurisdiction is that the additional federal claim was raised at the first opportunity, though otherwise untimely. Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 678 (1930). In Brinkerhoff-Faris, however, the federal claim was raised in the petition for rehearing, whereas here it was not. Furthermore, the Court in Brinkerhoff-Faris found that the plaintiff was unable to avail itself of a remedy which was established subsequent to the commencement of litigation. Petitioner is not here raising his constitutional claim at the first opportunity. Petitioner neglected to raise any such claims at any point during the disciplinary proceedings, although he had the opportunity to do so at every stage of the proceedings.

Petitioner claims that his neglect in presenting his constitutional claim was due to his denial of a forum in which to raise them. However, Petitioner fails to specify how he was denied any opportunity to present them. In fact, Petitioner was not denied an opportunity to raise such claims. He simply failed to do so.

Clearly, Petitioner could have presented his constitutional claim before the Hearing Board, Review Board, or the Supreme Court of Illinois. Petitioner did participate in the proceedings and raised several claims that the Hearing Board and Review Board erred. His claims, however, were of a factual and evidentiary nature, generally limited to the issue of the burden of proof.

II. DISCIPLINARY RULE 1-102 IS NOT VAGUE, INDEFINITE AND UNCERTAIN SO AS TO VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

Petitioner now alleges, for the first time, that Rule 1-102, of the Illinois Code of Professional Responsibility is vague and that his right to due process was violated. Petitioner's argument is without merit.

In In re Ruffalo, this Court stated that an attorney is a disciplinary proceeding is entitled to due process to the extent that he receive notice of the charge and an opportunity to be heard. 390 U.S. 544, 550 (1967). Both requirements have been satisfied.

Clearly, Rules 1-102(a)(3) and (4) of the Illinois Code of Professional Responsibility, which prohibit attorneys from engaging in illegal conduct involving moral turpitude and dishonesty, fraud, deceit or misrepresentation, are

not so vague that men of common intelligence must necessarily guess at its meaning. See Connally v. General Construction Co., 269 U.S. 385 (1926). Nor is it so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. See Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966). It is frivolous to suggest that the disciplinary rules fail to give adequate warning of proscribed activities. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Furthermore, Petitioner was not disciplined for violating Rule 1-102 alone. Petitioner was charged with conversion of client funds amounting to $4,033.24. Petitioner's theft of funds was illegal conduct involving moral turpitude and was dishonest. The complaint filed by the Administrator against Petitioner clearly set forth the

facts which established conversion. The charges against Petitioner were not vague and uncertain, but clear and specific.

Petitioner offers no legal authority to support of his assertion that Rule 1-102 is vague, uncertain and indefinite. By raising a constitutional claim at this late date, it is clear that he is attempting to distract attention from the real basis for his discipline, his conversion of client funds. In effect, Respondent is utilizing the Writ of Certiorari Petition to delay the commencement of his suspension.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES CONSTITUTION
AMENDMENT XIV.

U.S. CONST. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

28 U.S.C.§1257(3).

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX C

Ill. Rev. Stat. ch. 110A, Art. VIII, Rules 1-102 (1980) and 9-102(a)(1987)

RULE 1-102. Misconduct

(a) A lawyer shall not

(1) violate a disciplinary rule:

(2) circumvent a disciplinary rule through actions of another;

(3) engage in illegal conduct involving moral turpitude;

(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or

(5) engage in conduct that is prejudicial to the administration of justice.

RULE 9-102. Preserving Identity of Funds and Property of a Client

(a) All funds of clients paid to a lawyer or law firm, including funds belonging in part to a client and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more separate identifiable trust accounts in a bank or savings and loan association maintained in the State in which the law office is situated.

APPENDIX D

RULE 753(b), (c) and (e) of the Supreme Court of Illinois

Ill. Rev. Stat. ch 110A, para. 753 (b), (c) and (e)(1985)

(b) Filing a Complaint. A complaint voted by the Inquiry Board shall be prepared by the Administrator and filed with the Hearing Board. The complaint shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed.

(c) Hearing Board.

(1) There shall be a Hearing Board. It shall consist of not less than 21 members of the bar of Illinois. The members of the Board shall be appointed by the Commission to serve annual terms as commissioners of the court. The Commission may appoint such additional members of the Board as it deems necessary to carry on the work of the Board.

(2) The Hearing Board may act in panels of not less than three members each, as designated by the Commission. The Commission shall also designate one of the members of each panel as chairman. The majority of a panel shall constitute a quorum and the concurrence of a majority shall be necessary to a decision. In the absence of the chairman of a panel at a hearing, the members present shall designate one of their members as acting chairman.

(3) The hearing panels shall conduct hearings on complaints

filed with the Board and on petitions referred to the Board. The panel shall make findings of fact and conclusions of fact and law, together with a recommendation for discipline, dismissal of the complaint or petition, or nondisciplinary suspension.

(4) The Board shall set a date for hearing on a complaint not earlier than 21 days after the filing of the complaint. A copy of the complaint and a notice of the date for hearing shall be served on the respondent not less than 14 days prior to the date set for hearing.

(5) Proceedings before the Board shall be conducted according to the practice in civil cases as modified by rules promulgated by the Commission pursuant to Rule 751(a)

(6) Except as otherwise expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

(e) Review Procedure.

(1) Reports of the Hearing Board shall be reviewed by the Review Board upon the filing of exceptions by either party. The respondent or the Administrator may file exceptions to the report of the Hearing Board with the Review Board within 21 days after service of the report. If neither the respondent nor the Administrator files exceptions to the Hearing Board report, and the report recommends action by the

court, the report shall be filed with the court and submitted as an agreed matter. The court may approve the Hearing Board report, refer the case to the Review Board, or order briefs and oral argument.

(2) The parties shall not be entitled to oral argument before the Review Board as of right, but the Board may, in its discretion, permit or require briefs or oral arguments or both.

(3) The Review Board may approve the findings of the Hearing Board, may reject or modify such findings as it determines are not established by clear and convincing evidence, may make such additional findings as are established by clear and convincing evidence, may approve, reject or modify the recommendations, may remand the proceeding for further action or may dismiss the proceeding. A copy of the report or order of the Review Board shall be served on the respondent and the Administrator.

(4) If the Review Board concludes that disciplinary action is required, the report of the Board shall be filed with the court. If in such instance the Review Board affirms the findings and recommendations of the Hearing Board without change, the report of the Hearing Board may be transmitted to the court by the Review Board with its order of affirmance and no separate report need be filed by the Review Board.

(5) Within 21 days after service

of the order or report on him, the respondent may file exceptions with the court or a motion that the exceptions filed to the Hearing Board stand as exceptions to the report or order of the Review Board.

(6) The Administrator may petition the court for leave to file exceptions to the order or report of the Review Board. The petition shall be filed with the court, and a copy served on the respondent, within 21 days after service of the order or report of the Review Board on the Administrator. The proposed exceptions shall be attached to the petition. If the Administrator is granted leave to file exceptions, the order or report of the Review Board shall be filed with the court. The respondent may answer the exceptions within 21 days after service on him of a copy of the order of the court granting the Administrator leave to file the exceptions. The clerk shall not docket the Administrator's petition for leave to file exceptions unless the petition is allowed by the court.

(7) The parties shall not be entitled to oral argument before the court as of right, but the court may, in its discretion, permit or require briefs or oral argument or both. If the court permits or requires briefs, the brief of the party filing exceptions to the order or report of the Review Board, or moving that the exceptions filed to the

Hearing Board report stand as exceptions to the order or report, shall be filed within 35 days of the date of the entry of the order of the court permitting or requiring briefs. Briefs shall be prepared, filed and served in compliance with Rules 343 and 344.
(Amended, effective August 1, 1985).

Supreme Court, U.S.
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No. 89-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NICHOLAS T. KITSOS,

Petitioner,

VS.

JOHN C. O'MALLEY, ADMINISTRATOR, ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

While appearing, on the surface, to be instructive and authoritative, the Opposition Brief, nonetheless, is neither, and instead, is flawed, deceptive and inaccurate, fails to address squarely the Petition and does not really furnish or advance any helpful or valid reasons or usable citations in support as to why my Petition for Certiorari should not be granted.

Starting with the cases cited in support, the inaccuracy of application and meaning given and lack of support are most obvious.

Neither *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), nor *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), cited at pp. 8, 9, 10 and 11 of the Opposition Brief, involve a Petition for Certiorari nor the constitutional issues raised concerning a State Disciplinary Proceeding and of State Rules mandating the procedural limitations and deprivations of a constitutional dimension imposed upon me below.

These tacitly admitted limitations and deprivations by Respondent are exactly why Federal Protection is sought by me and why it is important for this Court to remand or establish, in this context, that a lawyer such as myself is Federally Protected and that the State Disciplinary System must accommodate the Supremacy of the Federal Constitutional Protections afforded or run the risk of failing to pass muster and being declared procedurally unconstitutional.

Through *In re Ruffalo*, 390 U.S. 544, 550 (1967), this Court determined that State Disciplinary Proceedings against a lawyer, while designed to protect the public are in fact a punishment or penalty imposed on the lawyer and are adversary proceedings of a quasi-criminal nature; *Ruffalo*, 390 U.S. at 551, and the absence there of state procedural due process deprived the lawyer of Federal Protection which required a Federal Court to reject, without an independent Federal Determination, the prior final State disciplinary procedure and findings as being controlling on the Federal Courts, *Ruffalo, supra*, 390 U.S. at 549-552.

This Court in *Ruffalo, supra*, concluded and stated:

> "The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived Petitioner of procedural due process."

This case thus squarely supports my request why Federal Constitutional protection can be granted to me by this Court and reverse the disciplinary punishment imposed on me much like this was done, and for like reasons as was done in *Ruffalo, supra.*

In *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), again cited as supporting authority for the Opposition Brief contentions, this case involved an unconstitutional State taxation of U.S. Bonds, and not a State disciplinary matter. This Court, there, reversed the State Court allowance of this unconstitutional practice and refused to abstain from doing so because of failure to sooner raise the constitutional challenge by the Appellant. Respondent is clearly mistaken as to the holding of this case.

In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), an appeal involving a State construction of a freight rate state statute, again cited as supporting the contentions made in the Opposition Brief that this Court does not have jurisdiction where the constitutional challenge is not timely raised below, this Court not only heard the appeal but decided the constitutional challenge raised against this state statute and affirmed the constitutionality of the state construction of the statute as not impairing a Federal right. There, this Court questioned whether there is, in fact, such a controlling rule of no jurisdiction as contended to be by the Opposition Brief; *Great Northern, supra*, 287 U.S. at 366-367. Apparently none was found (*id.* 367).

In recent Certioraries to this Court, the focus of this Court has been, as in *Great Northern, supra*, on whether the state procedural law bars presentation of petitioner's constitutional claims; *Pennzoil Co. v. Texaco Inc.*, 107 S. Ct. 1519, 1528 (1987).

The holding of this Court in *Pennzoil, supra*, makes it unquestionably clear that this Court will and does determine a constitutional challenge to a state proceeding when a litigant has not even attempted to present his Federal Claims below in the state proceeding where there is no adequate opportunity afforded the litigant in the state proceedings to raise his Federal constitutional claims; *Pennzoil, supra*, 107 S.Ct. 1519 at 1528.

The Opposition Brief simply ignores and does not mention in these contentions of the Respondent the very Rule 301 of the Respondent, set forth at App. 28 of my Petition for Certiorari, that prohibited me from raising my Federal claims in these disciplinary proceedings below.

This is the "unambiguous authority to the contrary" that prevents a Federal Court from assuming that state procedure will afford an adequate opportunity to raise my Federal Constitutional claims in the state proceedings.

Such "unambiguous authority to the contrary" is further found in the holding of the Illinois Supreme Court in *People ex rel. Harrod v. Illinois Courts Commission*, 69 Ill.2d 445, 372 N.E.2d 53, 65-66 (1977), that the Disciplinary Commission does not have the authority or power to interpret and construe constitutional provisions and constitutional claims.

Such review afforded to me, even before the Illinois Supreme Court, merely could be a mere fact determination and review of a fact determination made and not of Federal Constitutional claims, which are issues of law, Ill. Sup. Ct. Rule 753(e)(i), Ch. 110A, Ill. Rev. Stat. 1988, Section 753(e)(i).

But, nonetheless, I did, as best I could, raise my Federal claims below. I raised this in the exceptions filed in the Hearing Board and spoke on this in Oral Argument

to the Supreme Court. No one listened or paid any attention or even responded to this.

CONCLUSION

My Petition for Certiorari is important to me, obviously, but more importantly, places before this Court the opportunity to speak on and address a very important principle of constitutional dimension, that the State of Illinois and the other States of the Republic, that, as important as state interests in a state disciplinary proceeding of a lawyer may be, still, and nonetheless, the state interests must accommodate the raising of Federal claims in a meaningful way or risk being declared unconstitutional and that Federal law is supreme by our Constitution.

My Petition ought to be granted.

Respectfully submitted,

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